

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	
V.)	Cr. No. 04-10031-WGY
)	
JAMES E. REID,)	
)	
Defendant)	

**GOVERNMENT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO REQUIRE GOVERNMENT
TO PAY THE COST OF COPYING DISCOVERY DOCUMENTS**

The United States of America submits this Supplemental Memorandum in opposition to the defendant's motion to require the Government to pay the cost for duplication of discovery materials that the Federal Defender Office wants to have copied.

The Government filed its Opposition on February 16, 2005. On February 25, 2005, the United States Court of Appeals for the Third Circuit issued a decision that touches on the matter of defendant photocopying costs. In United States v. Pelullo, No. 02-2710, 2005 WL 433589 (3rd Cir. Feb. 25, 2005), one of defendant Pelullo's primary claims was that the Government had suppressed evidence (in a trial in the District of New Jersey) by failing to provide him with exculpatory information purportedly contained within 75,000 pounds of business documents (the "warehouse documents") seized in the course of a separate criminal investigation by federal officials in the Middle District of Florida. Id. at *3-5. As provided by F. R. Crim. P. 16, Pelullo, 2005 WL 433589, at *5 & n.7, on multiple occasions the government had offered to have the documents copied at

defendant Pelullo's expense (and also offered to obtain an estimate for the cost) but the defendant never accepted any of these offers. Id. at *5-7.

It is true that Pelullo involved "massive amounts of documents," Id. at *10, and numerous other complexities that are not at issue in the instant case.¹ Still, in reversing the district court's grant of a new trial and in finding that the Government had not suppressed Brady evidence, Id. at *1, the Third Circuit based its decision in part on the degree of access provided to the defendant:

We proceed to examine the purported suppression of the warehouse documents. Our analysis focuses on three overarching considerations: (1) the respective knowledge of the parties; (2) Pelullo's access to the warehouse documents; and (3) the government's representations.

Id. at *11. After first discussing the knowledge of the parties, the court moved to the question of access:

A further consideration here, which is perhaps of even greater import [than the government's knowledge], is that the government repeatedly made the warehouse documents available to Pelullo and his attorneys for inspection and copying.

Id. In a footnote to the sentence above, the court elaborated:

Pelullo asserts that the government knew that he could not afford to pay the expenses for the warehouse documents. He thus argues that offering to provide an incarcerated and impecunious defendant with copies of thousands of documents at his expense hardly satisfies the government's Brady

¹ For example, the Pelullo court noted that the defendant had been the subject of federal criminal prosecutions in three different Districts.

obligations. This argument is wholly unpersuasive. As the government points out, Pelullo could have sought reimbursement under the Criminal Justice Act for the expenses of obtaining the documents. See United States v. Feldman, 788 F.2d 625, 626 (9th Cir. 1986).

Pelullo, 2005 WL 433589, at *11 n.15.

Of note, in the Feldman case cited by the Pelullo court, the Ninth Circuit suggested the answer to the question at issue in the instant case. In considering whether an indigent pro se defendant could obtain reimbursement for photocopying and postage expenses, the court determined that indigent defendants have three options available for obtaining reimbursement for such expenses. Feldman, 788 F.2d at 626. If a defendant is represented by a court-appointed attorney, the attorney can claim reimbursement under the Criminal Justice Act. Id. If a defendant chooses to proceed pro se he can also obtain CJA reimbursement. Id.² But in discussing the third option available to indigent defendants, the Ninth Circuit made clear the assignment of responsibility for such expenses:

Alternatively, rather than seek a court-appointed attorney, an indigent defendant such as Feldman might request the Federal Public Defender to assume representational responsibility. In such cases, the

² Although not at issue in this case, two Courts of Appeals have disagreed with Feldman and held that the Criminal Justice Act does not allow reimbursements to pro se criminal defendants. See United States v. McElhiney, 369 F.3d 1168, 1170 (10th Cir. 2004); United States v. Green, 323 F.3d 1100, 1104-05 (8th Cir. 2003). But like the Ninth Circuit in Feldman, in neither of these cases did the court turn to the United States Attorney for payment of these defense costs.

Federal Public Defend[er's] congressionally-approved budget presumably covers all expenses incurred through appeal.

Id.

In short, by providing the defendant and his Federal Defender in this case with access to the discovery materials, and by providing for materials he selects to be copied at defense expense, the Government has fulfilled its obligations under F. R. Crim. P. 16. The expense must be borne by the Office of the Federal Defender, or alternatively under the Criminal Justice Act, but not by the Office of the United States Attorney.³

WHEREFORE, the Government further moves this Court to deny the defendant's motion.

Respectfully submitted this 11th day of March, 2005.

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY

By: /s/ Victor A. Wild
VICTOR A. WILD
Assistant U.S. Attorney

³ Cf. In re Baker, 693 F.2d 925, 927 (9th Cir. 1982) (noting that the CJA, to which the government is not a party, is the intended independent source for expenses of appointed counsel, and that it is merely "fortuitous that the payment comes from the same treasury that funds the prosecution.")

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by hand upon Leo T. Sorokin, Esq., Office of Federal Public Defender, 408 Atlantic Avenue, Boston, MA, on this the 11TH day of March, 2005.

/s/ Victor A. Wild

VICTOR A. WILD

Assistant U.S. Attorney